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No. 99-881

In the Supreme Court of the United States

LLOYD A. GOOD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a property owner's failure to demonstrate interference with his reasonable, investment-backed expectations may be dispositive of his regulatory takings claim, without regard to the economic impact of the challenged government regulation.

2. Whether the court of appeals correctly held that the denial of petitioner's application for a dredge-and-fill permit under the Rivers and Harbors Appropriation Act of 1899 and the Federal Water Pollution Control Act did not effect a taking of petitioner's property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 189 F.3d 1355. The opinion of the Court of Federal Claims (Pet. App. 16a-87a) is reported at 39 Fed. Cl. 81.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. The petition for a writ of certiorari was filed on November 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a 40-acre parcel of land abutting Sugarloaf Sound (a navigable waterway) in Lower Sugarloaf Key, Monroe County, Florida. The parcel

consists of two wetlands areas—26 acres of salt marsh fringed with mangroves, and six acres of freshwater sawgrass marsh—separated by an uplands area of roughly eight acres. Pet. App. 19a. The parcel was part of a $2 million portfolio of properties located throughout Lower Sugarloaf Key and Saddlebunch Key. *Id.* at 20a & n.2. Petitioner acquired a 70 percent interest in the parcel (as part of the portfolio) in 1973, and he acquired the remainder of the parcel two years later upon the death of his mother. *Ibid.* The total cost of the parcel in 1973 was $66,576.68. C.A. App. 389.[1]

When petitioner and his mother purchased the parcel in October 1973, each of the federal permit requirements relevant to this case was already in effect. Indeed, in the purchase contract for the parcel, petitioner expressly acknowledged the risk that "as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations." Pet. App. 2a. Section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA) prohibited construction activities below the mean high water mark (MHWM) of navigable waters without a permit from the Army Corps of Engineers (Corps). See 33 U.S.C. 403. A permit was also required under RHA Section 10 for construction activities occurring above

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[1] The petition states that petitioner and his mother purchased the land in 1973 for approximately $93,000. Pet. 3. In fact, $92,718.78 is petitioner's claimed "basis" in the property. Pet. App. 20a. That basis was calculated by adding $46,603.68 (the 1973 purchase price of petitioner's 70% share) and $46,115.10 (the asserted value of the 30% share belonging to petitioner's mother as of her death in 1975). C.A. App. 389. The 1973 purchase price of petitioner's mother's share was $19,973. *Ibid.* Thus, the total 1973 purchase price of the parcel was $66,576.68 ($46,603.68 plus $19,973).

the MHWM for purposes of creating a connection to and/or expanding the scope of the navigable waters (*e.g.*, in this case, the dredging of a canal or marina connecting to Sugarloaf Sound).[2] Since 1968, applications for RHA Section 10 permits had been subject to the Corps' "public interest review" regulations, which required the Corps to scrutinize a project's effects on water quality, recreation, fish and wildlife, pollution, and natural resources, in addition to effects on navigation. See 33 C.F.R. 209.120(d)(1) (1973); 33 C.F.R. 320.4(a); *United States* v. *Alaska*, 503 U.S. 569, 580-581 (1992) (describing the development of the Corps' approach, and stating that "the language of the statute and [the Court's] decisions interpreting it plainly authorized" the Corps' consideration of the factors set forth in the regulation); *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1187 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982).[3]

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[2] See *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1296-1299 (5th Cir. 1976); *Weiszmann* v. *United States Army Corps of Engineers*, 526 F.2d 1302, 1304 (5th Cir. 1976); *United States* v. *Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310 (5th Cir. 1976).

[3] In *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), the court of appeals upheld the Corps' authority to consider conservation factors in making permitting decisions under Section 10 of the RHA. The court observed that the RHA "does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit to one seeking to build structures on or dredge and fill his own property." *Id.* at 207. After extensive consideration of the RHA and related statutory provisions, *id.* at 207-214, the court concluded that "the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act," *id.* at 214. The court observed, *inter alia*, that the Corps is required under the Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. 661 *et seq.*, to consult with the

In 1972, Congress enacted Section 404 of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1344.[4] Section 404 expanded the geographic scope of the Corps' regulatory jurisdiction by requiring a permit for discharges of dredge or fill material into any "navigable waters," 33 U.S.C. 1344(a), defined for purposes of the CWA as "the waters of the United States," 33 U.S.C. 1362(7). The Corps' jurisdiction under Section 404 is not limited by traditional conceptions of navigability but includes, *inter alia*, wetlands above the MHWM that are adjacent to navigable waters. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-135 (1985).[5] Applications for Section 404 permits are subject to review both under the Corps' public interest review regulations and under specific environmental guidelines promulgated by the United States Environmental Protection Agency (EPA) and the Corps pursuant to Section 404(b)(1) of the CWA, 33 U.S.C. 1344(b)(1). See 40 C.F.R. Pt. 230; see also 33 U.S.C. 1344(c) (authorizing

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U.S. Fish and Wildlife Service and state conservation agencies regarding wildlife conservation issues before issuing a Section 10 permit. 430 F.2d at 209 & n.18.

[4] Section 404 of the CWA was enacted as part of the 1972 amendments to the Federal Water Pollution Control Act. See Pub. L. No. 92-500, § 2, 86 Stat. 884.

[5] The Corps did not revise its CWA Section 404 regulations to require permits for discharges of dredged or fill material into adjacent wetlands until 1975. See *Riverside Bayview*, 474 U.S. at 123-124. By the time of petitioner's purchase, however, the term "navigable waters" in the CWA had been judicially construed to reach all waters that may be regulated under the Commerce Clause. See *United States* v. *Ashland Oil & Transp. Co.*, 364 F. Supp. 349, 351 (W.D. Ky. 1973), aff'd, 504 F.2d 1317 (6th Cir. 1974).

EPA to veto the Corps' issuance of a Section 404 permit based on, *inter alia*, adverse impacts on wildlife).[6]

2. Petitioner's efforts to develop the parcel at issue here began in 1980, when he entered into a contingency-fee arrangement with a consulting firm to obtain the necessary local, state, and federal permits. Pet. App. 21a. The agreement provided that petitioner would pay a fixed fee of $24,000, plus one-third of any increase above $350,000 in the value of the parcel. *Ibid.* The agreement noted that "obtaining such permits is at best difficult and by no means assured." *Ibid.*

Petitioner first applied for a federal RHA/CWA dredge-and-fill permit in 1981. Pet. App. 22a.[7] His application (as amended) was based on a plan to build a 54-lot subdivision of single-family homes, complete with a 48-slip marina providing navigable access to Upper Sugarloaf Sound. *Ibid.* The development would have eliminated approximately 12.8 acres of wetlands. *Id.* at 22a-24a. The Corps granted that permit in 1983. *Id.* at 22a.[8] Petitioner was ultimately unable, however, to secure all of the necessary state and local regulatory approvals. *Id.* at 24a-30a.

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[6] State environmental regulation of coastal development in the Florida Keys had been in place well before 1973. See Pet. App. 80a-82a.

[7] Work requiring a permit under both the RHA and CWA may be addressed in a joint RHA/CWA permit application. Pet. App. 22a n.5 (citing 33 C.F.R. Pt. 325 App. A).

[8] The Corps issued a second, slightly modified permit in 1984. Pet App. 22a. In 1988, it granted petitioner a new RHA/CWA permit, with one significant modification. *Id.* at 23a-24a. The new permit restricted the filling of each wetlands-based lot to 40-by-40 foot building pads. *Id.* at 24a. That change would have reduced the overall wetlands loss from 12.8 acres to 10.53 acres. *Ibid.*

3. In 1990, petitioner applied to the Corps for a new RHA/CWA permit based on a revised plan. Pet. App. 30a.[9] The revised plan involved construction of 16 single-family homesites (all in wetlands, on completely filled lots), a navigable canal connecting to Upper Sugarloaf Sound, and a tennis court. *Id.* at 5a-6a, 30a-31a. Although the 1990 plan reduced the density of residential development as compared to the previous 54-lot plan, the plan would have only slightly reduced the overall loss of wetlands, from 10.53 acres to 10.17 acres. *Id.* at 30a.

Shortly before petitioner submitted the 1990 application, the Lower Keys marsh rabbit was listed as endangered under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* See 55 Fed. Reg. 25,588 (1990). In April 1991, the silver rice rat was also listed as endangered. See 56 Fed. Reg. 19,809 (1991). Pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), the Corps and the United States Fish and Wildlife Service (FWS) therefore initiated formal "consultation" on the project.[10] The FWS issued a Biological Opinion

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[9] Petitioner did not seek state or local approval for that plan. The Court of Federal Claims determined, however, that the plan would be subject to Monroe County's prohibition on dredging to provide access for docking facilities and on filling of salt marsh except where necessary to provide access to a parcel. See Pet. App. 27a, 30a.

[10] Section 7(a)(2) of the ESA requires federal agencies to "insure that any action" they authorize "is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. 1536(a)(2). If an agency determines that a proposed action may adversely affect an endangered species, it must engage in formal consultation with the FWS, which in turn must provide the agency with a written "Biological Opinion." 16 U.S.C. 1536(a)(2); 16 U.S.C. 1536(b)(3)(A). If the FWS determines that the proposed action will "jeopardize the continued existence" of the species, 16 U.S.C.

in December 1991, concluding that petitioner's proposed development was likely to jeopardize the continued existence of both species. Pet. App. 36a. As required by the ESA (see note 10, *supra*), the FWS proposed a series of "reasonable and prudent alternatives" to petitioner's plan, which would have allowed development of the parcel in a manner protective of the species. *Id.* at 36a-37a.

Although petitioner was afforded an opportunity to participate in the process by which the reasonable and prudent alternatives were developed, he declined to do so. Pet. App. 37a-38a & n.24. Instead petitioner submitted a letter from his environmental consultant and mammalogist, Dr. Larry Brown. *Id.* at 38a. Dr. Brown expressed the view that the marsh rabbit and silver rice rat were not found on the parcel in question, and that petitioner's proposed development therefore would not jeopardize the continued existence of the listed species. *Ibid.*

In March 1994, the Corps denied petitioner's permit application on the ground that the development proposed by petitioner would jeopardize the continued existence of the marsh rabbit. C.A. App. 338, 347. The Corps endorsed the reasonable and prudent alterna-

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1536(a)(2), the FWS must, if at all possible, suggest "reasonable and prudent alternatives" that would allow the project to go forward, 16 U.S.C. 1536(b)(3)(A). If an incidental "taking" of individual members of a listed species is likely to occur as a result of the proposed project, the Biological Opinion must include a statement "specify[ing] the impact of such incidental taking" (commonly known as an "incidental-take statement"). 16 U.S.C. 1536(b)(4). So long as the permit applicant complies with the terms and conditions of the statement, any incidental take is exempt from liability under the Act. See 16 U.S.C. 1536(*o*); see generally *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997).

tives suggested by the FWS, explaining that they were consistent with the project's purpose and would prevent jeopardy to the listed species. Pet. App. 39a. In response, petitioner asserted for the first time (based on a new report from Dr. Brown) that *any* development on the parcel would violate the ESA. *Id.* at 39a-40a. Shortly thereafter, petitioner filed suit against the United States in the Court of Federal Claims (CFC), alleging that the Corps' denial of his permit application had effected a taking of his property. *Id.* at 40a.[11]

4. The CFC granted summary judgment for the United States. Pet. App. 16a-87a. The court held that petitioner could not establish a "total" taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the Corps' actions did not render the parcel valueless or deprive petitioner of all economically viable use of his land. Pet. App. 51a-74a. The CFC relied on uncontested evidence presented by the

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[11] In 1995, after petitioner's suit had been filed, the FWS initiated a re-evaluation of its Biological Opinion and invited petitioner to assist in revising the reasonable and prudent alternatives to determine the full extent to which the site could be developed without jeopardizing the listed species. Pet. App. 40a-41a. Petitioner reiterated his "refus[al] to participate in any way in the alleged amended Biological Opinion." C.A. App. 981. In May 1995, the FWS issued a new Biological Opinion with revised reasonable and prudent alternatives. Pet. App. 41a. The revised alternatives would have allowed construction of seven or eight waterfront homesites in wetlands, complete with boat moorings and a navigable canal connecting to the Sound, in addition to significant development of the uplands portion of the site. *Ibid.*; C.A. App. 372-375, 385. The 1995 Biological Opinion included an Incidental Take Statement, which would shield petitioner from liability under the ESA for any incidental take of listed species, if petitioner implemented the reasonable and prudent alternatives in compliance with the statement's terms and conditions. *Id.* at 375-377.

government's appraiser, who had determined that (1) the property would have a fair market value of $80,000 if development were permitted in accordance with the revised reasonable and prudent alternatives[12] (*id.* at 68a-71a), and (2) the highest and best use of the property was for the sale of transferrable development rights (TDRs), which were worth approximately $110,000 (*id.* at 72a-74a).

The CFC also held that petitioner could not establish a taking under the three-part test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Pet. App. 74a-86a. The CFC ruled that the Corps' actions could not have interfered with petitioner's reasonable, investment-backed expectations, given the pervasiveness of the state and federal regulatory regimes in place at the time of petitioner's investment, and the fact that petitioner had knowingly assumed the risk that it might be difficult to obtain approvals for his project. *Id.* at 78a-84a. The court noted in particular that the sorts of dredge-and-fill operations contemplated by petitioner's development proposal

> had * * * been subject to federal regulation since the 1899 enactment of the RHA and its prohibition on such activities except by permit. By the late 1960s, the Corps RHA permit review included the consideration not only of navigation, but also of fish and wildlife, conservation, pollution, aesthetics, ecology and the general public interest.

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[12] In conducting that analysis, the government's appraiser assumed (contrary to the CFC's subsequent determination, see note 9, *supra*) that state and local approvals could be obtained for such a project. Pet. App. 70a.

Id. at 78a (citation omitted).

5. The court of appeals affirmed. Pet. App. 1a-15a. The court rejected petitioner's argument that his reasonable, investment-backed expectations were irrelevant to his "total" taking claim. *Id.* at 9a-11a. It held that "[r]easonable, investment-backed expectations are an element of every regulatory takings case." *Id.* at 10a. Because the court of appeals found "the expectations factor dispositive" in the instant case, it declined to address "the character of the government action or the economic impact of the regulation." *Id.* at 9a.

Petitioner emphasized that the Corps had approved his prior RHA/CWA permit applications and had denied the 1990 application solely on the ground that the proposed development would jeopardize the continued existence of a newly listed endangered species. See Pet. App. 11a-12a. Because the enactment of the ESA and the listing of the species postdated his acquisition of the property, petitioner contended that denial of the permit on ESA grounds necessarily interfered with his reasonable, investment-backed expectations. See *id.* at 12a. The court of appeals rejected that contention. It observed that

> [i]n 1973, when [petitioner] purchased the subject land, federal law required that a permit be obtained from the Army Corps of Engineers in order to dredge or fill in water adjacent to a navigable waterway. Even in 1973, the Corps had been considering environmental criteria in its permitting decisions for a number of years.

Ibid.

The court of appeals noted as well that development of the subject parcel required approval by state and county officials, and that petitioner had "acknowledged

both the necessity and the difficulty of obtaining regulatory approval" at the time he acquired the property. Pet. App. 13a. The court also explained that environmental regulation had grown more pervasive during the period between 1973 (when petitioner and his mother bought the parcel) and 1980 (when petitioner undertook his initial efforts to develop the property). *Id.* at 13a-14a. In light of all those factors, the court of appeals concluded that petitioner "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.* at 15a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with the decisions of this Court, any other court of appeals, or any state court of last resort. Further review is not warranted.

1. The requirement of a Corps permit for dredge-and-fill operations of the sort at issue here was established long before petitioner and his mother purchased the subject property in 1973. See Pet. App. 12a, 78a; pp. 2-3, *supra*. The Corps' authority under Section 10 of the RHA is broad indeed. "The statute itself contains no criteria by which the Secretary is to make an authorization decision; on its face, the provision appears to give the Secretary unlimited discretion to grant or deny a permit." *United States* v. *Alaska*, 503 U.S. 569, 576 (1992).

The breadth of discretion vested in the Corps by Section 10 reflects the paramount federal interest in activities affecting navigable waters. With respect to navigable waters, the federal government possesses

> a "dominant servitude," *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends

> to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

United States v. *Rands*, 389 U.S. 121, 123 (1967); see *United States* v. *Cherokee Nation*, 480 U.S. 700, 703-705 (1987). Although "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause," *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 (1979),[13] petitioner was on notice in 1973 that his ability to undertake development affecting navigable waters would be subject to extensive federal oversight.[14]

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[13] *Kaiser Aetna* involved an unusual situation in which a developer dredged a private fishpond in Hawaii and connected the fishpond to a nearby navigable bay by opening a channel across a barrier beach that had separated the two. 444 U.S. at 166-167. The United States then relied on the navigational servitude in asserting (1) that the pond had come under the Corps' authority under the RHA, and (2) that the public should have a right of access to the pond. *Id.* at 168-169. Although the Court held that mandating a right of public access to the pond would constitute a taking in the circumstances presented, *id.* at 177-180, it distinguished the scope of the navigational servitude for purposes of federal regulatory authority, including that of the Corps under the RHA, and it did not question the holding of the lower courts in that case that the developer's connecting of the pond to the nearby bay subjected the pond to the Corps' regulatory authority under the RHA. See *id.* at 169 & n.3, 171 & n.6.

[14] Petitioner's proposed development affected navigable waters in two respects. First, the CFC found that petitioner's "1990

It was also clear, at the time of purchase, that the Corps' decision whether to grant or deny a development permit would be based in part on environmental factors, including wildlife conservation. See Pet. App. 12a, 78a; p. 3 & note 3, *supra*. The enactment of the ESA in December 1973 changed the governing legal regime to a degree by forbidding the Corps to approve a development project that was likely to jeopardize the continued existence of an endangered species. Even before the ESA was enacted, however, the Corps possessed discretion to deny a permit application on that ground. Petitioner therefore could not have possessed a reasonable expectation that he would be permitted to develop his waterfront parcel in a manner inconsistent with wildlife conservation values generally, or with the protection of especially vulnerable species in particular. Indeed, the Fifth Circuit—which at that time included the State of Florida—had held in 1970 that the Corps was required to consult with the FWS and state conservation agencies regarding wildlife conservation issues before issuing a Section 10 permit. See *Zabel* v. *Tabb*, *supra*, discussed at note 3, *supra*, and in *United States* v. *Alaska*, 503 U.S. at 581.

At bottom, the fundamental inquiry in every takings case is "whether justice and fairness require that economic injuries caused by public action must be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Eastern Enter.* v. *Apfel*, 524 U.S. 498, 523 (1998) (opinion of

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Corps application clearly indicates that he proposed dredging below the [mean high water mark]." Pet. App. 46a n.28. Second, petitioner's development proposal included the dredging of a canal that would connect to Upper Sugarloaf Sound and thereby provide the residents with waterfront access. *Id.* at 30a-31a.

O'Connor, J.) (brackets and internal quotation marks omitted). In the instant case, petitioner chose to purchase land subject to a "dominant servitude" of the federal government. Petitioner was on notice at the time of purchase that any development affecting navigable waters would implicate important federal interests and would therefore require express federal approval. He was on notice as well that the Corps was vested by the RHA with very broad discretion to determine whether particular development proposals should be allowed, and that the permitting process would include consideration of wildlife conservation and other environmental values.

The existence of those potential barriers to development (as well as parallel state and local permitting requirements) was presumably factored into the purchase price. As the court of appeals recognized, "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." Pet. App. 11a (quoting *Creppel* v. *United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)).[15] Of course, if petitioner

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[15] See also Pet. App. 10a ("In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the risk, so that a purchaser could not show a loss in his investment attributable to it."); *Pro-Eco, Inc.* v. *Board of Comm'rs*, 57 F.3d 505, 511-512 (7th Cir.) (noting that a landowner who "knew at the time it bought the land that the Board's ordinance would hinder their efforts to develop the land however they wished" presumably factored that potential difficulty into the purchase price for the property), cert. denied, 516 U.S. 1028 (1995). In the instant case, petitioner expressly acknowledged at the time of purchase that "as of today there are certain problems in connec-

had succeeded in obtaining all of the requisite government approvals for his most ambitious development proposal, he would have reaped an enormous profit. But given the speculative nature of his original investment, petitioner cannot reasonably contend that the costs of wildlife protection have been "disproportionately concentrated" (*Eastern Enters.*, 524 U.S. at 523 (opinion of O'Connor, J.)) upon him. To the contrary, petitioner *chose* to purchase land for which the prospects of development were uncertain and the degree of federal regulatory oversight high.[16]

2. Petitioner contends that the court of appeals' decision conflicts with this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). That argument is incorrect.

Lucas did not hold that a property owner's reasonable, investment-backed expectations are irrelevant whenever a "total" taking is alleged. As *Lucas* ex-

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tion with the obtaining of State and Federal permission for dredging and filling operations." Pet. App. 2a.

[16] Consideration of reasonable, investment-backed expectations in this context is also supported by *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). In that case, the Court ruled that public disclosure of a company's proprietary data could not constitute a taking, where the company "had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA." *Id.* at 1008. The Court found that factor alone to be decisive, despite acknowledging that public disclosure of such data could completely "destroy" the "economic value of [the] property right" at issue. *Id.* at 1012; see also *id.* at 1005 (finding that "the force of [the reasonable, investment-backed expectations] factor is so overwhelming * * * that it disposes of the taking question"). The Court thus recognized that the absence of interference with reasonable, investment-backed expectations may itself be dispositive of a regulatory takings claim, regardless of the extent of the challenged regulation's economic impact.

plained, this Court has "generally eschewed any set formula" in deciding "when, and under what circumstances, a given regulation * * * [goes] too far for purposes of the Fifth Amendment," preferring instead to "engag[e] in . . . essentially ad hoc, factual inquiries." *Lucas*, 505 U.S. at 1015 (internal quotation marks omitted). Three factors are of "particular significance" to that ad hoc inquiry: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495 (1987).

In *Lucas*, this Court noted that there are "at least two discrete categories of regulatory action [that are] compensable without case-specific inquiry into the public interest advanced in support of the restraint": regulations that compel the property owner to suffer a physical "invasion" of his property, and regulations that deny "all economically beneficial or productive use of land." 505 U.S. at 1015. Although the Court held that such cases may receive "categorical treatment," in the sense that there is no need for "case-specific inquiry into the public interest advanced in support of the restraint," the Court did not say that a property owner's lack of reasonable, investment-backed expectations would be of no moment.[17]

The plaintiff in *Lucas* had acquired two beachfront lots in South Carolina in 1986, at a time when "he was

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[17] See also *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) ("The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. * * * Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.").

not legally obligated to obtain a permit from the [South Carolina Coastal] Council in advance of any development activity." 505 U.S. at 1008. He intended to erect single family residences on his lots, as the owners of the immediately adjacent parcels had been allowed to do. *Ibid.* The enactment in 1988 of the South Carolina Beachfront Management Act, however, "brought Lucas's plans to an abrupt end." *Ibid.* The Act and its implementing regulations created a new, absolute ban on coastal-zone construction, which effectively prohibited development of Lucas's tract. *Id.* at 1008-1009. Under those circumstances, the Court held that, if the effect of the development ban was to render the parcels valueless, the ban would effect a Fifth Amendment taking. *Id.* at 1020-1032.

The Court also recognized, however, that land-use regulation will not effect a compensable taking, even if it prohibits all economically beneficial use of the property, if the limitations it imposes "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. at 1029. The Court cited the federal government's navigational servitude as an example of the sort of "pre-existing limitation upon the landowner's title" the enforcement of which would not trigger takings liability. *Id.* at 1028-1029. The Court also made clear that no compensable taking occurs when the government discovers new information revealing that a particular use of land runs afoul of a pre-existing limitation. See *id.* at 1028-1029 (recognizing that "the corporate owner of a nuclear generating plant" is not entitled to compensation under the Fifth Amendment "when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault").

As we explain above, it was clear at the time petitioner bought the subject parcel that dredge-and-fill activities affecting navigable waters implicated substantial and longstanding federal interests; that the Corps of Engineers would have very broad discretion to determine whether any such activities would be permitted; and that its exercise of discretion would include consideration of (*inter alia*) wildlife conservation factors. Those limitations on the use of the parcel "inhere[d] in [petitioner's] title." *Lucas*, 505 U.S. at 1029. Nor can petitioner establish a takings claim simply through proof that the presence of endangered species on the subject parcel was unknown and unanticipated at the time of purchase. As with the hypothetical nuclear generator described in *Lucas*, the belated discovery that particular uses of petitioner's land fall under a pre-existing limitation does not disappoint petitioner's reasonable, investment-backed expectations in a manner that could give rise to takings liability.

3. The court of appeals' decision in this case does not conflict with the holdings of any other court of appeals or state court of last resort. Most significantly, none of the cases on which petitioner relies involves federal regulation of activities affecting the navigable waters of the United States. Petitioner's claim of a conflict incorrectly assumes (*inter alia*) that the constitutional rules generally governing land-use regulation apply with full force to property that is subject to the federal government's navigational servitude. The cases cited by petitioner are distinguishable on other grounds as well.

The Ninth Circuit cases cited by petitioner (Pet. 12-17) are inapposite. In *Dodd* v. *Hood River County*, 136 F.3d 1219 (9th Cir.), cert. denied, 119 S. Ct. 278 (1998),

for instance, the court noted (in the course of finding no taking) that *Lucas* did not apply to the case before it because the zoning decision being challenged had not deprived the claimant's property of all value. *Id.* at 1228. The court's one-sentence description of the categorical takings test under *Lucas* (*ibid.*) was *dictum*.

The Ninth Circuit's decision in *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (1996), aff'd, 526 U.S. 687 (1999), is similarly inapposite. There, the court held that the evidence presented at trial was sufficient to support the jury's finding that the city had deprived the property owner of all economically viable use of its land. *Id.* at 1432-1434. The court did not address the question whether property owners who find themselves in that situation are entitled to just compensation even where they lacked any reasonable, investment-backed expectation that they would be able to develop their property. Furthermore, the court characterized a *Lucas*-based categorical taking as "absolute" in that "no inquiry into the state's interests advanced in support of the regulation is required" (*id.* at 1432)—a statement consistent with the decision below.[18]

Petitioner cites a string of state court decisions (Pet. 14-17), but none of them creates a conflict that would warrant this Court's review. Of the four cases on which petitioner places primary reliance (Pet. 14-15), only the Vermont Supreme Court's decision in *Chioffi* v. *City of*

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[18] Petitioner also relies (Pet. 13-14) on the district court's findings in *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226 (D. Nev. 1999). But that decision has been appealed, see Nos. 99-15641 & 99-15771, appeals pending (9th Cir.), and, in any event, a conflict with a single district court opinion would not provide a sufficient basis for invoking this Court's review.

Winooski, 676 A.2d 786 (1996), was issued by a state court of last resort. The holding of that case, however —a finding that no taking had occurred because, *inter alia*, the zoning variance denial at issue did not cause a total diminution in value (*id.* at 790)—poses no conflict with the decision below.

The other three state court cases that petitioner highlights are decisions of intermediate appellate courts in which further review has been granted.[19] In any event, in none of those cases did the court squarely confront the situation where an owner, whose property has been rendered valueless by government action, cannot demonstrate any interference with reasonable, investment-backed expectations. Indeed, we are aware of no decision, from a court of appeals or a state court of last resort, in which a court has found a taking while holding that the challenged government regulation did not interfere with the claimant's reasonable, investment-backed expectations.

4. Even if the question presented warranted this Court's review, the instant case would be an inappropriate vehicle for resolving it. Neither the ESA nor the Corps' denial of petitioner's 1990 permit application placed a blanket prohibition on development of petitioner's parcel or, therefore, deprived it of all economic use of value. To the contrary, the 1995 revised reasonable and prudent alternatives, drafted by the FWS and endorsed by the Corps, represent the agencies'

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[19] See *McQueen* v. *South Carolina Coastal Council*, 496 S.E.2d 643 (Ct. App. 1998), cert. granted, No. 2779 (S.C. Mar. 18, 1999); *Adams Outdoor Adver.* v. *City of East Lansing*, 591 N.W.2d 404 (Ct. App. 1998), review granted, No. 113674 (Mich. Nov. 30, 1999); and *City of Miami* v. *Keshbro, Inc.*, 717 So. 2d 601 (Dist. Ct. App. 1998), review granted, 729 So. 2d 392 (Fla. 1999).

determination that petitioner's proposal could be modified to protect endangered species while at the same time allowing a significant degree of development (including construction of seven or eight out of the 16 proposed waterfront homesites). See note 11, *supra*. Petitioner also remains free to suggest other means by which the parcel could be developed in a manner that does not jeopardize listed species, but he has thus far declined to do so. See Pet. App. 37a-40a (describing petitioner's prior refusal to cooperate in the process by which reasonable and prudent alternatives to his 1990 development proposal were formulated). And petitioner could develop the uplands portion of the tract without obtaining an RHA/CWA permit from the Corps.

Moreover, the CFC squarely held that the Corps' permit denial did not render the subject property valueless because the property (a) would have a fair market value of $80,000 if development were permitted in accordance with the revised reasonable and prudent alternatives proposed by the FWS and accepted by the Corps (and if all necessary state and local approvals could be obtained), and (b) could also be used for the sale of transferrable development rights worth $112,000. Indeed, the parcel at issue is currently worth more in absolute dollar terms (though presumably somewhat less in constant dollars) than the $66,576.68 (see note 1, *supra*) that petitioner and his mother paid for it. Because the Corps' denial of petitioner's permit application did not deprive the property of all economic value, petitioner could not establish a compensable taking even if the court were required to ignore the question whether he had any reasonable, investment-backed expectations at the time of purchase.

In the court of appeals, petitioner contended that the relevant comparison for "total taking" purposes was between the value of the parcel under the reasonable and prudent alternatives suggested by the Corps, and the value the land would have had if petitioner's 1990 permit application had been granted in full (assuming in each case that petitioner could obtain the requisite state and local approvals). See Pet. C.A. Br. 26-32. Thus, petitioner relied on evidence that the property would have a value of between $1,200,000 and $1,540,000 if it could be developed in the manner described in petitioner's 1990 permit application. *Id.* at 27. By comparing that hypothetical value to the property's current value of $80,000 (for development under the revised RPAs, assuming state and local approval) or $112,000 (for the sale of TDRs), petitioner contended that the Corps' permit denial had effected a "diminution" in the parcel's value of over 90%. *Id.* at 23, 27, 28, 32.

The practical implications of petitioner's legal theory—*i.e.*, his contention that a land-use restriction that precludes all economically viable use effects a taking regardless of whether the owner had a reasonable, investment-backed expectation that he would be able to develop the property—cannot realistically be assessed in isolation from the issue of how a denial of economically viable use is to be identified. As we explain above, petitioner has contended that a "diminution" in value sufficient to establish a "total" taking can be established by comparing the property's actual value to the hypothetical value it would have if an existing use restriction were eliminated. When combined with petitioner's contention that reasonable, investment-backed expectations are irrelevant in a "total taking" case, petitioner's theory has extraordinary implications

for land-use regulation. His theory logically implies that a person could purchase a tract of real property that was subject to pre-existing restrictions (*e.g.*, land that was zoned for a particular use) and *immediately* establish a total taking simply through proof that the land would dramatically appreciate in value if the restrictions were eliminated. Nothing in this Court's decisions supports such a result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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